

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TONYA T. COOLEY,) NO. CV 10-03432-MAN
Plaintiff,)
v.) MEMORANDUM OPINION
MICHAEL J. ASTRUE,)
Commissioner of Social Security,) AND ORDER
Defendant.)

)

Plaintiff filed a Complaint on May 12, 2010, seeking review of the denial by the Social Security Commissioner (the "Commissioner") of plaintiff's application for a period of disability, disability insurance benefits ("DIB"), and social security income ("SSI"). On June 21, 2010, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on April 25, 2011, in which: plaintiff seeks an order reversing the Commissioner's decision and remanding this case for the payment of benefits or, alternatively, for further administrative proceedings; and defendant requests that the Commissioner's decision be affirmed or, alternatively, remanded for further administrative

1 proceedings. The Court has taken the parties' Joint Stipulation under
2 submission without oral argument.

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4 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

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6 Plaintiff, who was born on May 20, 1960, filed an application for
7 a period of disability, DIB, and SSI.¹ (Administrative Record ("A.R.")
8 25.) Plaintiff claims to have been disabled since January 24, 2005, due
9 to a neck injury, carpal tunnel syndrome in both wrists, disc
10 deterioration and spurs, and depression. (A.R. 28, 43, 123, 176.)
11 Plaintiff has past relevant work experience as a restaurant manager and
12 waitress. (A.R. 30.)

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14 After the Commissioner denied plaintiff's claim initially and upon
15 reconsideration (A.R. 25, 43-47, 54-58), plaintiff requested a hearing
16 (A.R. 65-66). On November 19, 2008, plaintiff, who was represented by
17 counsel, appeared and testified at a hearing before Administrative Law
18 Judge Helen Hesse (the "ALJ"). (A.R. 663-86.) Medical expert Joseph
19 Jensen (an orthopedic surgeon) and vocational expert Stephen Berry also
20 testified. (*Id.*) On April 22, 2009, the ALJ denied plaintiff's claim
21 (A.R. 25-32), and the Appeals Council subsequently denied plaintiff's
22 request for review of the ALJ's decision (A.R. 6-9). That decision is
23 now at issue in this action.

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27 ¹ On the alleged disability onset date, plaintiff was 44 years
28 old, which is defined as a "younger individual." (A.R. 30 (citing 20
C.F.R. §§ 404.1563, 416.963).)

SUMMARY OF ADMINISTRATIVE DECISION

The ALJ found that plaintiff has not engaged in substantial gainful activity since January 24, 2005, the alleged onset date of her claimed disability. (A.R. 27.) The ALJ further found that plaintiff met the insured status requirements of the Social Security Act through December 31, 2010. (*Id.*) The ALJ determined that plaintiff has the following severe impairments: "multi level cervical degenerative disc disease C5-6 and C6-7 with bulging, neural foraminal narrowing and left sided radiculopathy, left shoulder impingement and tendonitis, and bilateral carpal tunnel syndrome with status post carpal tunnel release with improvement and left median nerve slowing." (A.R. 27.) The ALJ also determined that plaintiff does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1525, 404.1526, 416.925, 416.926). (A.R. 28.)

After reviewing the record, the ALJ determined that plaintiff has the residual functional capacity ("RFC") to:

21 perform light work as defined in 20 C.F.R. §§ 404.1567(b) and
22 416.967(b) which permits lifting and carrying 20 pounds
23 occasionally and 10 pounds frequently, sitting for 6 hours out
24 of an 8 hour day, and standing/walking for 6 hours out of an
25 eight hour day with a change of position at normal workday
26 breaks; no walking over uneven surfaces; no climbing
27 ladders/scaffolds or crawling; occasional climbing stairs,
28 bending, balancing, stooping, kneeling, and crouching;

frequent handling/gross manipulation and frequent fine manipulation/manual dexterity/fingering with the left hand; no reaching at or above shoulder level with the bilateral upper extremities; occasional range of motion of the neck from side to side or up and down; and no working at unprotected heights or being around dangerous or fast moving machinery.

(A.R. 28.)

The ALJ concluded that plaintiff was unable to perform her past relevant work. (A.R. 30.) However, having considered plaintiff's age, education, work experience, RFC, as well as the testimony of the vocational expert, the ALJ found that jobs exist in the national economy that plaintiff could perform, including those of information clerk, cashier, and sales attendant. (A.R. 31.) Accordingly, the ALJ concluded that plaintiff has not been under a disability, as defined in the Social Security Act, from January 24, 2005, through the date of her decision. (A.R. 32.)

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine whether it is free from legal error and supported by substantial evidence in the record as a whole. Orn v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citation omitted). The "evidence must be more than a mere scintilla but not necessarily a preponderance." Connett v.

1 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). "While inferences from the
2 record can constitute substantial evidence, only those 'reasonably drawn
3 from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063,
4 1066 (9th Cir. 2006)(citation omitted).

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6 Although this Court cannot substitute its discretion for that of
7 the Commissioner, the Court nonetheless must review the record as a
8 whole, "weighing both the evidence that supports and the evidence that
9 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
10 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
11 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
12 responsible for determining credibility, resolving conflicts in medical
13 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
14 1035, 1039 (9th Cir. 1995).

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16 The Court will uphold the Commissioner's decision when the evidence
17 is susceptible to more than one rational interpretation. Burch v.
18 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
19 review only the reasons stated by the ALJ in his decision "and may not
20 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
21 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
22 the Commissioner's decision if it is based on harmless error, which
23 exists only when it is "clear from the record that an ALJ's error was
24 'inconsequential to the ultimate nondisability determination.'" Robbins
25 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
26 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
27 at 679.

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DISCUSSION

Plaintiff makes the following claims: (1) the ALJ improperly evaluated plaintiff's excess pain testimony; and (2) the ALJ erred at step 5 by improperly relying on the vocational expert's opinion that certain job positions would accommodate neck motion limitations when the Dictionary of Occupational Titles (the "DOT") was silent on the matter. (Joint Stipulation ("Joint Stip.") at 1-32.)

III. The ALJ Failed To Give Clear And Convincing Reasons For Finding Plaintiff's Excess Pain Testimony To Be Not Credible.

Once a disability claimant produces objective evidence of an underlying impairment that is reasonably likely to be the source of his subjective symptom(s), all subjective testimony as to the severity of the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir. 1991)(*en banc*); see also 20 C.F.R. §§ 404.1529(a), 416.929(a) (explaining how pain and other symptoms are evaluated). "[U]nless an ALJ makes a finding of malingering based on affirmative evidence thereof, he or she may only find an applicant not credible by making specific findings as to credibility and stating clear and convincing reasons for each." Robbins, 466 F.3d at 883. The factors to be considered in weighing a claimant's credibility include: (1) the claimant's reputation for truthfulness; (2) inconsistencies either in the claimant's testimony or between the claimant's testimony and his conduct; (3) the claimant's daily activities; (4) the claimant's work record; and (5) testimony from physicians and third parties concerning

1 the nature, severity, and effect of the symptoms of which the claimant
2 complains. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
3 2002); see also 20 C.F.R. §§ 404.1529(c), 416.929(c).

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5 The ALJ found that plaintiff's "medically determinable impairments
6 . . . could be expected to produce the alleged symptoms." (A.R. 29.)
7 Further, the ALJ cited no evidence of malingering by plaintiff.
8 Accordingly, the ALJ's reason for rejecting plaintiff's credibility must
9 be "clear and convincing."

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11 In finding plaintiff to be not entirely credible, the ALJ stated
12 that:

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14 [i]n terms of treatment, . . . [plaintiff] confirmed that she
15 had not undergone neck surgery, stating that she had a fear of
16 surgeries, but on the other hand, reported that a left
17 shoulder surgery was pending for December 2008. She stated
18 that the results following her right carpal tunnel surgery
19 were okay, although she still had some numbness, but that her
20 left wrist was worse. The record references that she was
21 reportedly comfortable with just utilizing wrist splints.
22 [Plaintiff] has stated that she is unable to lift, push/pull,
23 grasp, turn her neck or use her hands, although the objective
24 evidence does not show that she is totally precluded from
25 performing these activities.

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27 (A.R. 29.) Thus, while not completely clear, it appears that the ALJ
28 found plaintiff to be not credible because: (1) plaintiff's reason for

1 declining neck surgery -- to wit, her fear of surgeries -- is
2 inconsistent with her pending and prior surgeries; and (2) the objective
3 evidence does not show that plaintiff is totally precluded from lifting,
4 pushing/pulling, grasping, turning her neck, or using her hands, as
5 alleged.

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7 The ALJ's first ground for finding plaintiff to be not credible is
8 neither clear nor convincing. At the November 19, 2008 administrative
9 hearing, plaintiff testified that she had declined neck surgery in the
10 past, because she had a "fear of surgeries." (A.R. 668.) Notwithstanding her fear, plaintiff testified that, because of the pain
11 she experiences, she has "no choice" but to have neck surgery. (A.R.
12 675.) While not yet scheduled, plaintiff indicated that she would have
13 neck surgery some time after her upcoming left shoulder surgery. (*Id.*)
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16 Contrary to the ALJ's finding, the Court does not find plaintiff's
17 prior refusal to undergo neck surgery due to her "fear of surgeries" to
18 be inconsistent with plaintiff's prior and pending surgeries. First,
19 unlike plaintiff's other surgeries, there are controverted medical
20 opinions regarding whether plaintiff should undergo surgery on her neck.²
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22 ² A.R. 263 (05/13/05 -- Kevin Shamlou, M.D. recommends that
23 plaintiff "not . . . have the surgery unless she cannot bear the
24 symptoms"); A.R. 531 (07/25/07 -- Gregory Carlson, M.D. (an orthopedic
25 surgeon) "did not feel that [plaintiff] is a surgical candidate"); A.R.
26 604 (08/28/07 -- John H. Freeman, M.D. noted that "Dr. Coufal . . .
27 recommended surgery in the past[, but Dr. Freeman is] recommending a
28 reevaluation by Dr. Coufal at this point"; two Agreed Medical Experts
("AME"), not identified, recommended surgery; and one AME, not
identified, recommended against surgery); A.R. 583 (02/04/08 -- Daniel
A. Levine, M.D. recommends, in a neurological consultation, that
plaintiff see Srinath Samudrala, M.D. for a "definitive neurological
opinion" regarding surgery); A.R. 645 (07/01/08 -- Dr. Freeman
recommends surgery; "feels [plaintiff] needs surgery on her neck first

1 Second, there are substantial risks involved in plaintiff's neck
2 surgery, including, *inter alia*, a 20-30% risk of nonunion of plaintiff's
3 bones because of plaintiff's history of smoking. (A.R. 662.)
4 Significantly, it was noted that, if plaintiff develops nonunion, she
5 "might require a posterior stabilization [procedure]" -- *i.e.*, another
6 surgery. (*Id.*) Third, plaintiff's prior surgeries have not been
7 entirely successful. Following her carpal tunnel release surgeries,
8 plaintiff reported numbness in her right wrist and a worsening in her
9 left wrist. (A.R. 29, 596, 598.) In fact, medical examiner Dr. Mark
10 Mandel, M.D. noted that plaintiff's grip strength readings have not
11 improved since surgery. (A.R. 545.) Lastly, it is unclear how
12 plaintiff's pending left shoulder surgery is inconsistent with
13 plaintiff's prior refusal to undergo neck surgery, particularly in view
14 of the fact that, notwithstanding her fear, plaintiff testified that she
15 would be having neck surgery.

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17 Accordingly, in view of the controverted opinions regarding
18 plaintiff's neck surgery and the significant risks involved therein, the
19 results of plaintiff's prior wrist surgeries, as well as plaintiff's
20 testimony that she would undergo neck surgery, plaintiff's prior refusal
21 to undergo neck surgery because of her fear of surgeries does not appear
22 to be inconsistent with her prior and pending surgeries. Therefore, the
23 ALJ's reasoning does not constitute a clear and convincing reason for
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27 and then surgery on the shoulder"); A.R. 661-62 (10/07/09 -- Dr.
28 Samudrala recommends surgery, but notes that plaintiff has a 20-30% risk
of nonunion because of her history of smoking).

1 finding plaintiff to be not credible.³
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3 The ALJ's second reason for discrediting plaintiff is also neither
4 clear nor convincing. In his decision, the ALJ notes that plaintiff
5 "has stated that she is unable to lift, push/pull, grasp, turn her neck
6 or use her hands, although the objective evidence does not show that she
7 is totally precluded from performing these activities" (A.R. 29.) As
8 an initial matter, the ALJ fails to identify specifically what
9 "objective evidence" undermines plaintiff's alleged limitations.
10 Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998)(noting that
11 "[g]eneral findings are insufficient; rather, the ALJ must identify what
12 testimony is not credible and what evidence undermines the claimant's
13 complaints") (citation and internal citations omitted); see also Dodrill

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15 ³ While recognizing that a court may "review only the reasons
16 provided by the ALJ in the disability determination and may not affirm
17 the ALJ on a ground upon which he did not rely," in this case, it
18 appears that the ALJ *may* have rejected plaintiff's credibility, in part,
19 because plaintiff failed to undergo a recommended treatment -- *i.e.*,
20 neck surgery. Orn, 495 F.3d at 630. It is well established that the
21 failure to follow a prescribed treatment that would ameliorate an
22 impairment, without good reason, is a valid basis for denying benefits.
23 20 C.F.R. §§ 404.1530(b), 416.930(b). However, "it is improper to deny
24 benefits on the basis of declined surgery, when surgery is only a
25 suggested rather than a *prescribed* course of treatment." Aquirre v.
26 Astrue, 2009 WL 3346741, at *5, 2009 U.S. Dist. LEXIS 129988, at *13
27 (C.D. Cal. 2009); see Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir.
28 1985)(finding that a claimant's refusal to undergo surgical treatment is
not a sufficient reason to deny benefits where surgery was at most
recommended or suggested but not prescribed by a physician); see also
Young v. Califano, 663 F.2d 469, 472-73 (9th Cir. 1980)(unwillingness to
undergo a suggested surgery does not constitute a failure to follow
prescribed treatment); 20 C.F.R. §§ 404.1530(a)-(b), 416.930(a)-(b) ("In
order to get benefits, you must follow treatment *prescribed* by your
physician . . . [and i]f you do not follow the *prescribed* treatment
without a good reason, we will not find you disabled.")(emphasis added).
As noted *supra*, in this case, there are differing medical opinions
regarding whether plaintiff should undergo surgery on her neck.
Additionally, the medical evidence does not indicate that neck surgery
was ever prescribed. Accordingly, to the extent the ALJ rejected
plaintiff's credibility because plaintiff failed to follow her treatment
by not undergoing neck surgery, the ALJ erred.

1 v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993)(if the ALJ does not accept
2 a claimant's testimony he must make specific findings rejecting it).
3 Further, the failure of the medical record to corroborate fully
4 plaintiff's subjective symptom testimony is not, by itself, a legally
5 sufficient basis for rejecting such testimony. Rollins v. Massanari,
6 261 F.3d 853, 856 (9th Cir. 2001); Bunnell, 947 F.2d at 347 (noting that
7 "[i]f an adjudicator could reject a claim of disability simply because
8 [plaintiff] fails to produce evidence supporting the severity of the
9 pain there would be no reason for an adjudicator to consider anything
10 other than medical findings"). Accordingly, the ALJ's finding that the
11 objective evidence does not support the extent of plaintiff's symptoms
12 cannot, by itself, constitute a clear and convincing reason for
13 discrediting plaintiff's testimony. See Varney v. Secretary, 846 F.2d
14 581, 584 (9th Cir. 1988); Cotten v. Bowen, 799 F.2d 1403, 1407 (9th Cir.
15 1986); see also Burch, 400 F.3d at 681.

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17 Moreover, and significantly, the ALJ failed to address plaintiff's
18 testimony regarding the side effects of her pain medication⁴ (A.R. 675,
19 678) and her difficulties sitting for more than an hour and
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21 ⁴ An ALJ must consider the alleged side effects of a claimant's
22 medications in the disability evaluation. See Erickson v. Shalala, 9
23 F.3d 813, 817-18 (9th Cir. 1993)(noting that an ALJ must consider all
24 factors, including the side effects of medications, that might have a
25 "'significant impact on an individual's ability to work'")(citation
26 omitted); see also Soc. Sec. Ruling 96-7p, 1996 WL 374186, at *2-*3,
27 1996 SSR LEXIS 4, at *7-*8 (noting that type, dosage, effectiveness, and
28 side effects of any medication the individual takes or has taken to
alleviate pain or other symptoms should be considered in the disability
evaluation); 20 C.F.R. §§ 404.1529(c)(3)(iv), 416.929(c)(3)(iv). In
this case, plaintiff's Adult Disability Report and testimony indicate
that plaintiff's pain medication, Norco, causes her to feel drowsy/tired
(A.R. 125) and lose focus (A.R. 678). Clearly these side effects could
have a significant impact on plaintiff's ability to work, and thus, the
ALJ's failure to consider them constitutes error.

1 standing/walking for more than 90 minutes without experiencing pain
2 (A.R. 676). The ALJ's failure to address all of plaintiff's pain and
3 symptom testimony, much less articulate any clear and convincing
4 reason(s) for rejecting it, constitutes error.

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6 Accordingly, for the aforementioned reasons, the ALJ failed to give
7 clear and convincing reasons, as required, for discrediting plaintiff's
8 testimony.⁵

9

10 **II. On Remand, Further Inquiry May Be Appropriate To Remedy Any**
11 **Potential Conflict Between the DOT And The Vocational Expert's**
12 **Testimony.**

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14 Based on the foregoing, there are several matters that the ALJ
15 needs to review and reconsider on remand. As a result, the ALJ's
16 conclusion regarding plaintiff's RFC and her capacity to perform "other
17 work" may change. Accordingly, the Court does not reach plaintiff's
18 second claim, *to wit*, that the ALJ erred at step 5 by relying on the
19 vocational expert's opinion that the jobs of information clerk, cashier,
20 and sales attendant would accommodate plaintiff's neck motion
21 limitations when the DOT was silent on the matter.

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23 Although the Court does not reach plaintiff's second claim, the

24

25 ⁵ Moreover, while defendant proffers several reasons to explain
26 the ALJ's credibility determination -- including, *inter alia*,
27 plaintiff's lack of atrophy -- the Court cannot entertain these post hoc
rationalizations. See, e.g., *Connett*, 340 F.3d at 874 (stating "[w]e
are constrained to review the reasons the ALJ asserts" and "[i]t was
error for the district court to affirm the ALJ's credibility decision
based on evidence that the ALJ did not discuss").

1 Court notes that many district courts have construed the Ninth Circuit's
2 holding in Massachi v. Astrue, 486 F.3d 1149 (9th Cir. 2007) to mean
3 that "where[, as in this case,] an expert opines on an issue about which
4 the DOT is silent, a conflict exists." Smith v. Astrue, 2010 WL
5 5776060, at *11-*12, 2010 U.S. Dist. LEXIS 141443, at *32-*33 (N.D. Cal.
6 2010)(holding that, "because the DOT does not address sit/stand options,
7 the potential inconsistency between the vocational expert's testimony
8 and DOT warrant further inquiry on remand); see Valenzuela v. Astrue,
9 2009 WL 1537876, at *3-*4, 2009 U.S. Dist. LEXIS 46249, at *8-*9 (N.D.
10 Cal. 2009)(finding that further inquiry upon remand was appropriate when
11 a vocational expert's testimony that certain positions would accommodate
12 a sit/stand option was potentially in conflict with the DOT, which was
13 silent on the matter). Therefore, because the DOT is silent with
14 respect to neck motion limitations -- limitations which the ALJ found
15 plaintiff to have -- and there could be a potential inconsistency
16 between the vocational expert's testimony and the DOT, further inquiry
17 on remand may be appropriate.

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19 **III. Remand Is Required.**

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21 The decision whether to remand for further proceedings or order an
22 immediate award of benefits is within the district court's discretion.
23 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no
24 useful purpose would be served by further administrative proceedings,
25 or where the record has been fully developed, it is appropriate to
26 exercise this discretion to direct an immediate award of benefits. *Id.*
27 at 1179 ("[T]he decision of whether to remand for further proceedings
28 turns upon the likely utility of such proceedings."). However, where

1 there are outstanding issues that must be resolved before a
2 determination of disability can be made, and it is not clear from the
3 record that the ALJ would be required to find the claimant disabled if
4 all the evidence were properly evaluated, remand is appropriate. *Id.*
5 at 1179-81.

6

7 Remand is the appropriate remedy to allow the ALJ the opportunity
8 to remedy the above-mentioned deficiencies and errors. See, e.g.,
9 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004) (remand for
10 further proceedings is appropriate if enhancement of the record would
11 be useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989)
12 (remand appropriate to remedy defects in the record).

13

14 On remand, the ALJ must correct the above-mentioned deficiencies
15 and errors. After so doing, the ALJ may need to reassess plaintiff's
16 RFC in which case additional testimony from a vocational expert likely
17 will be needed to determine what work, if any, plaintiff can perform.

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CONCLUSION

Accordingly, for the reasons stated above, IT IS ORDERED that the decision of the Commissioner is REVERSED, and this case is REMANDED for further proceedings consistent with this Memorandum Opinion and Order.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for defendant.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 27, 2011

Margaret A. Nagle
MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE